United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1521
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket Number 74-1521

ARTHUR WILLIAM CABRERA,

Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

BRIEF FOR APPELLANT

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Attorneys for Appellant
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Edward N. Leavy
Kenneth S. Birnbaum
Of Counsel

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STATEMENT OF THE CASE

Appellant, Arthur William Cabrera was indicted for failing to report for induction into the Armed Forces, in violation of Title 50, U.S.C. App., §451 et seq., 32 CFR 1632.14 and for failing to report for an Armed Forces physical examination, in violation of Title 50 U.S.C. App., §451 et seq., 32 CFR 1628.16. He was convicted under the second count, and the appeal herein is taken from that conviction. The court below acquitted Mr. Cabrera on the first count, since "...the notice of induction was issued contrary to Local Board Memorandum No. 73." (Opinion Below, p. 20.)

Mr. Cabrera registered with Selective Service Local Board No. 5 in Hempstead, New York in November, 1969, and reported for his physical, as requested, in December of 1969. He was reclassified I-Y in July of 1970. He wrote to his Local Board in October of 1970 requesting a duplicate registration card and classification card. The Board mailed the requested cards to Mr. Cabrera. He was again classified I-A on February 23, 1971. Mr. Cabrera had been living in Springfield, Massachusetts between 1969 and 1971, and had so informed his Local Board.

He traveled to Mexico in March of 1971, en route to Cuba. He returned to the United States from Cuba in early June of 1971.

On March 23, 1971, Local Board No. 5 mailed the

appellant an order to report for an Armed Forces physical examination scheduled for April 23, 1971. Since Mr. Cabrera was in Cuba both on the day the letter was to be received and on the day the physical was scheduled, he did not appear for the examination.

The appellant sent a letter to his Local Board in early June of 1971 after he returned to the United States, advising it that he "was just notified by a friend that (he) received two letters from (his) Selective Service Board in Long Island, New York." (Appellant's Letter of June 15, 1971, p. 1.) He noted in the letter that he had been in Cuba since late March. The Local Board made no effort to respond, but instead referred Mr. Cabrera's case to the United States Attorney for the Eastern District of New York.

QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

This brief on appeal is addressed to the following questions:

1. Did the government prove beyond a reasonable doubt that the appellant had the requisite intent not to report for his physical examination?

2. Did the prosecution of Mr. Cabrera result from a premature decision of the government that the appellant would not serve in the Armed Forces?

SUMMARY OF ARGUMENT

POINT I

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT HAD THE REQUISITE INTENT NOT TO REPORT FOR HIS PHYSICAL EXAMINATION.

A.

RECEIPT OF THE LETTER NOTIFYING THE APPELLANT OF HIS PHYSICAL EXAMINATION WAS NOT PROVEN.

B.

PROPER COMMUNICATION OF THE CONTENTS OF THE LETTER WAS ALSO NOT DEMONSTRATED.

C.

THE REQUISITE CRIMINAL INTENT SHOULD NOT HAVE BEEN INFERRED BY THE TRIAL COURT FROM THE FACTS AND CIRCUMSTANCES IN THIS CASE.

POINT II

THE PROSECUTION OF MR. CABRERA RESULTED DIRECTLY FROM THE PREMATURE DECISION OF THE GOVERNMENT THAT THE APPELLANT WOULD NOT SERVE IN THE ARMED FORCES.

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT HAD THE REQUISITE INTENT NOT TO REPORT FOR HIS PHYSICAL EXAMINATION.

A. Receipt of the Letter Notifying The Appellant of His Physical Examination Was Not Proven.

> "The failure to report for a pre-induction physical must be done knowingly if it is to be violative of the statute."
> (Opinion Below, p. 6).

The opinion cites United States v. Rabb, 394 F. 2d 230 (3rd Circ., 1968) for the rule that the registrant must be aware of his obligation and be given sufficient notice to be able to comply for the requisite criminal intent to attach.

The Rabb case reversed a verdict against the registrant because of the faulty charge of the trial judge regarding willfulness. Rabb stated that:

> "Willfulness is a state of mind in which a defendant is fully aware of his obligations to comply with the order for induction."
> United States v. Rabb, at 232.

Mr. Cabrera never had that state of mind in which he was "fully aware of his obligations," and therefore cannot be said to have knowingly failed to report for his

pre-induction physical.

An inference of knowledge will only be drawn if the registrant has been informed of his duty in a manner which would reasonably provide that he receive proper notice. Prosecution for failure to report for a physical examination by the Government, without first providing the registrant with adequate notice of his obligations, would be a denial of due process of law.

There is no dispute that Mr. Cabrera was out of the country at the time the notice for his physical examination was mailed. He was also not at an address where mail could have been forwarded to him. The government has not indicated that any other communications regarding his physical examination were ever sent to him.

The appellant wrote to his local board upon his return to the United States that he had been notified by a friend that the letter informing him of his physical had been sent. His response contained no evidence, however, that Mr. Cabrera had ever seen the letter, or that he was aware of its contents, (including the date that the examination was scheduled), or that he knew of any of the rights and obligations which it may have noted. Nonetheless, the Court below, cited United States v. DeNarvaez, 407 F. 2d 185, 187 (2nd Circ.) cert denied, 396 U.S. 822 (1969)

deciding that "one could assume that he received this letter upon his return," and therefore found that "the defendant received actual notice of (the) order and thus possessed the requisite criminal intent to make the act a knowing one." (Opinion Below, p. 8).

In DeNarvaez, the registrant had left New York for Bogota , Columbia before the notice to report for a physical examination to be held in March of 1962 had been sent to him. His parents forwarded the notice to him and he wrote to his local board, indicating that he never received the letter. The Board sent a second notice directly to Bogota for another physical scheduled for April 3, 1962. DeNarvaez claimed that he never received this notice either. The Board sent another letter regarding the April 3, 1962 physical to a new Florida address of the registrant, of which it had been advised. DeNarvaez claimed that he did not receive this one either.

He did not return to the United States until April 14, 1962, and left again on April 23, 1962 without contacting his local board. It was much more probable that the greater efforts made by the Board there would make the registrant aware of his rights and obligations. The lower Court in the case at bar erred, given the differences between

the actions of the respective Local Boards in DeNarvaez and the case at bar, and the fact that Mr. DeNarvaez made no effort to contact his Board. The Court should not have used the DeNarvaez decision to justify the assumption that Mr. Cabrera also received adequate notification upon his return to the United States.

The Court below decided that Mr. Cabrera failed to raise the reasonable doubt required to overcome the presumption of receipt. Appellant respectfully submits that the Court erred in this judgment also.

It is agreed that the mere mailing of a letter by the Selective Service System to the last known address of a registrant creates that presumption. However, this is a rebuttable presumption. United States v. Bowen, 414 F 2d. 1268 (3rd Cir. 1969). If the defendant successfully raises a reasonable doubt as to whether he actually received the orders in question from his local board then the government, without more, will fail to discharge its burden to demonstrate proper notice. See United States v. Smith, 308 F. Supp. 1262 (S.D.N.Y. 1969). (Here a conscientious objector did not report to his local board for assignment to alternative service on the date noted on an order sent to him. He claimed that he never received the notice and presented evidence that mail boxes in his building were often robbed. The Court rejected out of hand the contention

of the government that the mere demonstration that the order was sent creates an irrebuttable presumption that the defendant received it, and United States v. Simmons, 476 F. 2d. 33 (9th Cir. 1973). (reversing a conviction for failure to report for induction, citing as error the instruction of the trial judge that, as a matter of law, the mailing of any order by the local board to the registrant's last known address "...shall constitute notice to him of the contents of the communication whether he actually received it or not.")

B. Proper Communication of the Contents of the Letter Was Also Not Demonstrated.

The opinion below states, at page 8, that even if Mr. Cabrera never received the order to report for a physical, "he was made sufficiently aware of his responsibility upon his return, as evidenced in his June 15th letter." The opinion then goes on to cite United States v. Velazquez, Docket No. 73-1869 (2nd Cir., December 28, 1969), 490 F. 2d 29, for the proposition that "Actual receipt of the written order is not required to fulfill the notice requirement and make defendant's refusal to report a knowing one." It buttresses this position by citing United States v. Abrams, 476 F. 2d 1067 (7th Cir., 1973) and United States v. Williams, 433 F. 2d 305 (9th Cir., 1970).

Appellant agrees that, as Velazquez ruled, the government may use a variety of means of communicating the obligation if those means would reasonably be expected to give the registrant adequate notice of his rights and obligations. In the Abrams and Williams cases, the acceptable method employed was having an F.B.I. agent inform the defendant personally about the obligation. In Velasquez at least one of the three letters sent by the local board could be assumed to have been received. Any doubt regarding this assumption was erased when Velasquez actually appeared at his induction examination.

A variety of methods of communication may indeed be acceptable. However, relying on a friend of the registrant to convey information contained in the letter of the local board should not be included among those acceptable methods. We therefore submit taht the manner of conveying, and the content of, the information received by the registrants in Velasquez, Abrams, and Williams was qualitatively different from that which was involved in the case at bar. These decisions cannot now be used to support the notion that having a friend tell a registrant that a letter was received is the kind of communication which creates sufficient notice of the obligations to the registrant.

Further support for the contention of the appellant is provided in the case of United States v. Gross,

5 SSLR 3728 (S.D.N.Y. 1972). There, the defendant who was away from his mailing address when the letter requesting him to report for his physical examination was sent, testified that the letter was never received, although it was not returned to the local board. His parents had notified the board shortly after the mailing of the letter that it had not been received. The local board failed to send out another letter.

In overturning the conviction of Mr. Gross for failing to meet his continuing duty to report for a physical examination, the Court said that it:

> "cannot find beyond a reasonable doubt, however, that the defendant's failure to report for a physical examination was unlawful and knowing in the criminal sense, when he was never given another date on which to report. The answer may be that the Draft Board did not think he could lawfully be indicted without it. That was an understandable 'mistake' by the Draft Board, but it hardly put the burden on the defendant to knock on the door of the Draft Board and demand a date for the physical."

United States v. Gross, at 3728.

The trial Court distinguished Gross because of a large number of later actions of the Draft Board which were inconsistent with the idea that the registrant had a continuing duty to report for his physical. (Opinion Below,

pp. 14-15). However, the Court in Gross decided the case, based upon the above-quoted decision, before it even discussed those other factors. It only enumerated them to demonstrate that even if it had found a continuing duty on the part of the registrant in that case, (which it did not, because one letter from the Board was considered insufficient notice), these later acts would not have led a reasonable person to think that he had an obligation to report for his physical. It must be emphasized that the actual decision was based on the fact that the original letter, which the registrant knew had been sent but which he never received, was inadequate notice. It was therefore insufficient to create the requisite intent.

C. The Requisite Criminal Intent Should Not Have Been Inferred By The Trial Court From The Facts And Circumstances In This Case.

The opinion in this case inferred the criminal intent of the appellant from various "facts and circumstances, Silverman v. United States, 220 F. 2d 36, 39-40 (8 Cir. 1955), including the defendant's past conduct, United States v. Leavy, 422 F. 2d 1155, 1157 (9 Cir.), cert. denied, 397 U.S. 1076, 90 S. Ct. 1524 (1970) and defendant's statements. United States v. Myers, 410 F. 2d 693 (2 Cir.) cert. denied, 396 U.S. 835, 90 S. Ct. 93 (1969)." (Opinion Below, page 6).

The opinion found from these facts and circumstances "that defendant intended, by his conduct, to evade an impending duty, which ripened into a present duty." (Opinion Below, page 9). Appellant submits that the cases relied upon to support this idea involve actions which are far more affirmative and evidentiary of the intent of the registrant, and that the conduct of Mr. Cabrera was not such that the Court could conclude his intent beyond a reasonable doubt.

In Silverman, the registrant left the United States for Israel, for a much longer period than did Mr. Cabrera. While in Israel, he wrote to his board that he was not able to return to the United States. Mr. Cabrera had already returned before he made any contact with his board and was therefore hardly demonstrating the same unwillingness to serve as did Silverman. The Leavy case involved the sincerity of a defendant who claimed a conscientious objector status. The Court there decided that review of his local board's rejection of that classification cured the originally invalid rejection of his C. O. application. The appeals board made its judgment based upon his previous school and police record. The Court found that this record provided ample evidence of the insincerity of the registrant. No similarly conclusive evidence was presented in the case at bar.

Citing of Myers by the Court below most clearly demonstrates the inapplicability of using this

series of cases to infer the intent of the appellant. The defendant in Meyers actually went to his induction and handed out anti-war leaflets. This is quite a bit different from making remarks in letters sent to a Local Board. Despite the comments he made, Mr. Cabrera could have still reported for his physical examination. Deducing his intent not to appear from his remarks - even assuming he was aware of his obligation - was mere speculation by the lower Court. Criticizing the government in a letter is not behavior equal to that exhibited in Myers. Unlike Mr. Myers, Mr. Cabrera still had the opportunity to report properly.

Even in the Gross Case, supra, the Court noted, at 3728, that the evidence did not reveal "Gross's eagerness to become a member of the Armed Forces..." But the Court relied on the fact that it still had a reasonable doubt that the notice was ever actually received. It therefore did not infer the intent of the defendant from his attitude about the armed forces.

The court in the Cabrera decision should also not have inferred the intent of the appellant from his expressed attitude about the armed forces. Mr. Cabrera did appear for a physical when he got his first notice in December of 1969. While his letter of June 15, 1971 does strongly state his opposition to the Military, it also contains a suggestion that he would ultimately serve.

This service may or may not have been "as an agent or undesirable" as he says, but his potential performance in the armed forces is not the issue here.

It is one thing to express an attitude about the army in a letter to a draft board, and quite another to take affirmative action which would be in violation of existing statutes. The first time Mr. Cabrera actually had to make a decision (i.e. at the time of his December, 1969 physical) he complied. Surely this complaince is equally strong evidence of his intentions regarding his second physical as was his letter to the local board.

The lower court opinion saw virtually no significance in Mr. Cabrera's October, 1970 letter requesting duplicate registration and classification cards. (Opinion Below, P.15). The appellant submits that this request cannot be dismissed so easily. A registrant simply does not send this kind of letter unless he ultimately intends to comply with Selective Service System regulations. To see no importance in the October letter because the "defendant never requested any information as to his status," is to require too much of the appellant.

The issue here is the intent, not the eagerness, of Mr. Cabrera to comply with Selective Service regulations. Maintaining his contact with the local board and requesting new copies of the documents which describe his current

military status is evidence that the appellant did not have the requisite state of mind to avoid taking his physical examination. His final remarks in the October, 1970 letter obviously do not demonstrate an eagerness to join the armed forces. Nevertheless, the action of requesting those cards should overcome any inference which the words in the letter create. He would have voluntarily, although not enthusiastically, taken his physical examination if he were adequately informed of it.

The Court below also was influenced in its assessment of the intentions of the appellant by his timing in leaving the United States. By virtue of his departure almost one month after receipt of his classification, the opinion found "...that defendant intended, by his conduct, to evade an impending duty, which ripened into a present duty." (Opinion Below, page 9). It reaches this conclusion by first noting that more than fourteen months earlier, Mr. Cabrera had received a notice for a physical examination thirty days after being classified IA. The Court then concluded that, in 1971, the appellant "...may have believed, correctly so, that the order for a physical would be mailed one month later." (Opinion Below, p. 5, note 9).

Appellant submits that this reasoning is based upon the most fragile of structures. No evidence was

presented regarding the reason for the time of Mr. Cabrera's departure from the United States. To use what may very well have been coincidences of dates to ascertain the requisite intent of the appellant is simply unfair to Mr. Cabrera.

POINT II

THE PROSECUTION OF MR. CABRERA RESULTED DIRECTLY FROM THE PREMATURE DECISION OF THE GOVERNMENT THAT THE APPELLANT WOULD NOT SERVE IN THE ARMED FORCES.

The opinion below states that the appellant incorrectly relied upon United States v. Haug, 150 F. 2d 911 (2d Cir., 1945) in his post-trial memorandum. (Opinion Below, p. 12). This case was put forward for the proposition that the local board failed to meet its obligation by not notifying Mr. Cabrera of his continuing duty, even after receipt of his letter of June 15. This failure was influenced by his remarks in that letter. While we acknowledge that the Board would not ordinarily have the responsibility to remind a registrant of his continuing obligation, we feel that it did have that responsibility here, because of Mr. Cabrera's statement that he was out of the country when the original letter was sent.

The District Court distinguished Haug because there the registrant was prosecuted for anticipated action (Opinion Below, p. 12). The Haug case demonstrated that the attitude of a prospective inductee towards military service clearly has no impact on the rights which are guaranteed to him, nor on the procedures which must be followed by the Selective Service System. The System is obliged to follow the same procedure for all registrants

regardless of the feelings they express. In United States v. Haug, 150 F. 2d 911 (2d Cir., 1945) a Norweigian national registered with a local board as a formality, although he had no intention of serving in the armed forces. The local board sent a questionnaire to an address he had given, but his name was incorrectly noted and the letter never reached him.

The government prosecuted Haug even though the questionaire had not been received because the defendant acknowledged that he would not have filled it out had it been delivered. The government argued that although Haug never received the questionnaire, he was to be charged as if he had, because of his intent not to comply with his duties as a registrant. In ordering the conviction reversed, Judge Learned Hand ruled that while the seaman's defiant attitude towards serving in the armed forces may have been "culpable morally," it was not a crime in itself and did not relieve the Selective Service System of any of its obligations toward him.

It is submitted that a failure to inform registrants of all relevant information would deprive them of the opportunity to change their course of action, or, indeed, of their opportunity to take any intelligent action at all. Yet, in the instant case, the Selective Service System did not give Mr. Cabrera that opportunity, since it

failed to respond after learning that he had not been in the country to receive the original letter. The System apparently had decided that the appellant did not intend to appear for his physical "and in the face of the defendant's professed intentions such reminder would appear unwarranted." (Government's Memorandum of Law In Opposition to Defendant's Motion to Dismiss, p. 7).

The Government, as in Haug, did not provide any further information to Mr. Cabrera regarding his rights and liabilities. It anticipated that he would not appear even though, as in the Gross case, there is no indication that the registrant - while aware that a letter was sent -ever received any official communication. A direct result of the failure by the government to furnish any additional information was this prosecution. The distinguishing point that the lower Court found between the case at bar and Haug is therefore more apparant than real. In both cases, the government anticipated from the attitude of the registrants prior to the point at which they were obliged to act that they would not act properly, and prosecutions resulted. The Selective Service System still had an obligation to inform the registrants in both cases, and the attitudes of neither Mr. Cabrera nor Mr. Haug relieved it from that obligation.

CONCLUSION

Defendant respectfully requests that the verdict be reversed and that he be granted an acquittal on the charges in the indictment.

The Government failed to prove beyond a reasonable doubt that Mr. Cabrera had the requisite intent not to report for a physical examination. Neither the letter sent by the Selective Service System, nor the conversation with his friend gave Mr. Cabrera adequate notice of his obligation to report for the physical. The statements and actions of Mr. Cabrera were also not sufficient for the requisite intent to be inferred from them.

The Government decided that the appellant would not serve in the military before he had to make the actual decision regarding service. Consequently, it did not feel obliged to provide him with proper notification regarding his physical. This premature decision by the government prevented Mr. Cabrera from knowing of his physical, and resulted directly in his prosecution.

Dated: New York, New York
4th day of June, 1974

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